

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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CLERK US DISTRICT COURT DISTRICT OF NEVADA	
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RANDALL G. BROWN,

Plaintiff,

v.

ROBERT BANNISTER, *et al.*,

Defendants.

3:11-cv-00151-RCJ-VPC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

March 21, 2012

This Report and Recommendation is made to the Honorable Robert C. Jones, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for a temporary restraining order (#20).¹ Defendants opposed (#21) and plaintiff did not reply. Also before the court is defendants' motion for summary judgment (#22).² Plaintiff opposed (#32) and defendants replied (#33). The court has thoroughly reviewed the record and recommends that defendants' motion for summary judgment (#22) be granted. The court further recommends that plaintiff's motion for a temporary restraining order (#20) be denied as moot.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Randall Brown ("plaintiff"), a *pro se* inmate, is currently incarcerated at Northern Nevada Correctional Center ("NNCC") in the custody of the Nevada Department of Corrections ("NDOC") (#1). Plaintiff's complaint alleges violations of his Eighth Amendment right to be free from cruel and unusual punishment. *Id.* Pursuant to 28 U.S.C. § 1915A, the court screened the complaint and permitted his Eighth Amendment claim of deliberate indifference to a serious medical

¹ Refers to the court's docket numbers.

² Defendants also filed exhibits A and B under seal in support of their motion for summary judgment (#24 (*sealed*)).

1 need to proceed against NDOC Medical Director Robert Bannister, NNCC Director of Nursing I
 2 John Peery, and NDOC Director of Nursing II John Keast (#2, p. 9).³ Defendants Bannister, Peery,
 3 and Keast ("defendants") bring the instant motion (22).

4 In count IX, plaintiff alleges that he can only take eight to ten steps at a time due to injuries
 5 in both his knees (#1, p. 19).⁴ Plaintiff states that NDOC's orthopedic surgeon determined that the
 6 damage could be repaired with surgery but that defendants, as part of the Utilization Review Panel,
 7 refused to approve surgery due to cost. *Id.* Plaintiff asserts that he is confined to a wheelchair and
 8 that he was granted parole over a year ago, but the only halfway house that would accept him in a
 9 wheelchair costs more than he can afford. *Id.* Plaintiff claims he is unable to work in prison due to
 10 his injury. *Id.*

11 The following facts are undisputed. In 2004, while on parole, plaintiff stepped off a curb and
 12 injured his right knee (#24, Ex. A, p. 2 (*sealed*)). In February 2005, plaintiff was re-incarcerated in
 13 the custody of NDOC (#22, Ex. D, p. 4). Plaintiff complained of pain in his right knee and NDOC
 14 referred plaintiff to Dr. Long, an orthopedic surgeon for a consultation (#24, Ex. A, pp. 1-2 (*sealed*)).
 15 On May 11, 2005, Dr. Long examined plaintiff and determined that plaintiff suffers from congenital
 16 hyperextension of both his knees, a deformity in the knee joint in which the knee bends backwards.
 17 *Id.* at 2. On May 16, 2005, Dr. Long determined that he "was unable to find any corrective surgery
 18 for this problem." *Id.* at 1. Dr. Long noted that plaintiff should use a left knee brace to prevent
 19 hyperextension of the left knee, and recommended arthroscopic debridement, a process of removing
 20 dead tissue from around an injury. *Id.* Dr. Long also noted that "this should best be handled at a
 21 tertiary medical center, such as the University of California." *Id.* NDOC provided plaintiff with a
 22 wheelchair, knee braces, a walker, and a cane to assist him with his knee condition. *Id.* at Ex. B.
 23 NDOC also gave plaintiff Tylenol to treat his pain. *Id.* at Ex. A, pp. 17, 19-29, 23-27, 29). NDOC
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 26 ³ The court issued its screening order and severed the claims of each plaintiff. Plaintiff's sole
 27 count in the complaint is set forth in count IX (#1, pp. 18-19).

⁴ When citing to plaintiff's complaint, the court utilizes plaintiff's handwritten numbering at
 the bottom of the page.

1 medical providers, including the defendants, determined that “surgery is not possible given plaintiff’s
2 condition” (#22, Ex. C, p. 1).

3 Defendants filed the instant motion seeking summary judgment on plaintiff’s claim (#22).
4 Defendants first argue that assuming plaintiff’s medical need was serious, plaintiff cannot
5 demonstrate that defendants were deliberately indifferent to a serious medical need. *Id.* at 5.
6 Defendants assert that a difference of opinion between plaintiff and a physician as to the need for
7 surgery is insufficient to establish deliberate indifference. *Id.* Lastly, defendants argue they are
8 entitled to qualified immunity on all claims, and cannot be sued for damages for acts performed in
9 their official capacities. *Id.* at 6-7. In support of their arguments defendants attach plaintiff’s
10 medical records (#24, Exs. A, B (*sealed*)).⁵ Defendants also attach defendant Bannister’s affidavit
11 and plaintiff’s Offender Information Summary (#22, Exs. C, D).⁶

12 In his opposition, plaintiff argues that Dr. Long ordered “arthroscopic debridement of a
13 meniscus tear” and that defendants “failed to carry out medical orders and have intentionally
14 interfered with prescribed treatment” (#32, pp. 2, 4). Plaintiff also contends that defendants failed
15 to consult the University of California regarding his condition. *Id.* at 2. Plaintiff further argues that
16 defendants acted with deliberate indifference to his medical need when they provided him with knee
17 braces that did not fit correctly and caused plaintiff to develop a rash. *Id.* at 3. Lastly, plaintiff
18 contends that defendants are not entitled to qualified immunity. *Id.* at 5. Plaintiff attaches Dr.
19 Long’s physician notes, an affidavit signed by plaintiff, and defendants’ responses to plaintiff’s
20 interrogatories. However, the evidence plaintiff attaches fails to raise a triable issue of material fact
21 as to plaintiff’s claim of deliberate indifference to a serious medical need. The court will not
22 consider new claims that plaintiff raises for the first time in his opposition regarding a rash and
23 defective knee braces. *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).
24

25
26 ⁵ Defendants attach Karen Walsh’s declaration authenticating plaintiff’s medical records (#22,
27 Ex. C).

⁶ Defendants attach Molly Collins’s declaration authenticating plaintiff’s Offender
Information Summary (#22, Ex. C)

1 Defendants reply that plaintiff fails to produce any evidence which shows a genuine issue for
 2 trial (#33, p. 2). Defendants argue that plaintiff's arguments amount to a difference of opinion
 3 between plaintiff and medical professionals. *Id.* They further state that Dr. Long's report was a
 4 consultation and that Dr. Long acknowledged that there is no known corrective surgery for plaintiff's
 5 condition. *Id.* at 3. Lastly, defendants state that plaintiff's complaint does not allege that his knee
 6 braces caused him a rash. *Id.* at 3-4.

7 The court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the
 8 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the
 9 benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir.
 10 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

11 II. DISCUSSION & ANALYSIS

12 A. Discussion

13 1. Summary Judgment Standard

14 Summary judgment allows courts to avoid unnecessary trials where no material factual
 15 disputes exist. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).
 16 The court grants summary judgment if no genuine issues of material fact remain in dispute and the
 17 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must view
 18 all evidence and any inferences arising from the evidence in the light most favorable to the
 19 nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). However, the Supreme
 20 Court has noted:

21 [W]e must distinguish between evidence of disputed facts and disputed
 22 matters of professional judgment. In respect to the latter, our inferences must
 23 accord deference to the views of prison authorities. Unless a prisoner can
 24 point to sufficient evidence regarding such issues of judgment to allow him
 to prevail on the merits, he cannot prevail at the summary judgment stage.

25 *Beard v. Banks*, 548 U.S. 521, 530 (2006). Where reasonable minds could differ on the material
 26 facts at issue, however, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*,
 27 477 U.S. 242, 251 (1986).

1 The moving party bears the burden of informing the court of the basis for its motion, and
 2 submitting evidence which demonstrates the absence of any genuine issue of material fact. *Celotex*
 3 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party
 4 opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set
 5 forth specific facts showing that there exists a genuine issue for trial. *Anderson*, 477 U.S. at 248.
 6 Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a
 7 party who fails to make a showing sufficient to establish the existence of an element essential to that
 8 party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-
 9 23.

10 **B. Analysis**

11 Plaintiff brings suit against defendants and alleges that defendants violated his Eighth
 12 Amendment rights when they denied plaintiff's request for surgery (#1, p. 18). Defendants filed
 13 a motion for summary judgment claiming that they were not deliberately indifferent to plaintiff's
 14 serious medical need because they provided him with medical care and treatment (#22). To support
 15 this contention, defendants submitted plaintiff's medical reports and records *in camera* and under
 16 seal (#24, Exs. A, B (*sealed*)). Defendants also argue that a difference of opinion between medical
 17 professionals or between plaintiff and medical professionals does not amount to deliberate
 18 indifference (#22, p. 5). The court agrees.

19 **1. Deliberate Indifference to Serious Medical Needs**

20 A prisoner's claim of inadequate medical care arises under the Eighth Amendment. The
 21 unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by
 22 the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). To prevail on an action
 23 alleging cruel and unusual punishment, a plaintiff's case must satisfy an objective standard – that
 24 the deprivation was serious enough to amount to cruel and unusual punishment, and a subjective
 25 standard – deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also Wilson*
 26 *v. Seiter*, 501 U.S. 294, 297-304 (1991). A prison official violates the Eighth Amendment when
 27 he responds with deliberate indifference to an inmate's serious medical need. *Farmer*, 511 U.S. at

1 834.

2 The objective requirement of a "serious medical need" is met if the failure to treat a
3 prisoner's condition could result in further significant injury or the "unnecessary and wanton
4 infliction of pain." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*,
5 429 U.S. 97, 104 (1976)). In this circuit, examples of serious medical needs include "the existence
6 of an injury that a reasonable doctor or patient would find important and worthy of comment or
7 treatment; the presence of a medical condition that significantly affects an individual's daily
8 activities; or the existence of chronic and substantial pain." *Lopez v. Smith*, 203 F.3d 1122, 1131
9 (9th Cir. 2000) (citations omitted).

10 The subjective standard of deliberate indifference requires "more than ordinary lack of due
11 care for the prisoner's interests or safety." *Farmer*, 511 U.S. at 835, (quoting *Whitley v. Albers*, 475
12 U.S. 312, 319 (1986)). The requisite state of mind lies "somewhere between the poles of negligence
13 at one end and purpose or knowledge at the other." *Id.* at 836. To prove deliberate indifference,
14 plaintiff must demonstrate that prison staff denied, delayed, or intentionally interfered with medical
15 treatment or that the way prison staff provided medical care indicates deliberate indifference, and
16 that plaintiff sustained damages as a result of such conduct. *Hutchinson v. United States*, 838 F.2d
17 390, 394 (9th Cir. 1988). Prison medical staff do not violate the Eighth Amendment simply because
18 their opinion concerning medical treatment conflicts with the opinion of the inmate-patient.
19 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). Moreover, "mere delay of surgery,
20 without more, is insufficient to state a claim of deliberate medical indifference." *Shapley v. Nev.*
21 *Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam); accord *McGuckin*
22 *v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992).

23 Further, a difference of opinion between medical professionals concerning the appropriate
24 course of treatment generally does not amount to deliberate indifference to serious medical needs.
25 *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). However, a prisoner can establish that such a
26 difference of opinion amounted to deliberate indifference where "the course of treatment the doctors
27 chose was medically unacceptable under the circumstances," and such a course of treatment was

1 chosen "in conscious disregard of an excessive risk to the prisoner's health." *Jackson v. McIntosh*,
2 90 F.3d 330, 332 (9th Cir. 1996) (citing *Williams v. Vincent*, 508 F.2d 541, 543-44 (2d Cir. 1974)
3 (holding that inmate stated a claim for deliberate indifference where prison medical staff threw
4 away the inmate's severed ear, told the inmate that 'he did not need [it],' and made no effort to
5 reattach it").

6 Plaintiff's Eighth Amendment claim centers on the defendants' denial of plaintiff's request
7 for knee surgery. Dr. Long, an orthopedic specialist, was unable to identify any corrective surgery
8 for plaintiff's knee condition (#24, Ex. A, p. 1 (*sealed*)). Thus, plaintiff's allegation that Dr. Long
9 determined that damage to plaintiff's knees could be repaired with surgery is unsubstantiated (#1,
10 p. 18). Defendant Bannister also determined that no corrective surgery exists for plaintiff's
11 condition (#22, Ex. C). Moreover, mere delay of surgery, without more, is insufficient to state a
12 claim of deliberate medical indifference . . . unless the denial was harmful." *Shapley, Nevada Bd.*
13 *of State Prison Com'rs*, 766 F.2d 404, 407 (9th Cir. 1985). Plaintiff has not presented evidence to
14 show that a denial of his request for surgery resulted in harm to his knee condition. At most, there
15 is a demonstrated difference of opinion between plaintiff and defendants regarding the need or
16 availability of corrective surgery. Plaintiff's claim that a denial of corrective surgery is deliberate
17 indifference to his medical need fails as a matter of law because a difference of opinion between
18 plaintiff and a physician as to whether surgery is necessary is insufficient to establish deliberate
19 indifference. *See Franklin*, 662 F.2d at 1344.

20 While Dr. Long did not identify a corrective surgery for plaintiff's condition, he did note
21 that plaintiff could undergo an arthroscopic debridement of a meniscus tear. *Id.* To the extent
22 plaintiff argues that defendants' denial of this procedure constitutes deliberate indifference, a
23 difference of opinion between medical professionals concerning the appropriate course of treatment
24 generally does not amount to deliberate indifference to serious medical needs. *Sanchez*, 891 F.2d
25 at 242. For a difference of opinion to rise to the level of deliberate indifference, plaintiff must
26 establish that the course of treatment chosen was "medically unacceptable under the circumstances,"
27 and was chosen "in conscious disregard of an excessive risk" to plaintiff's health. *Jackson*, 90 F.3d

1 at 332. The facts presented simply do not meet this requirement. Plaintiff has presented no
 2 evidence to establish that the decision made by the Utilization Review Panel was medically
 3 unacceptable. Nor has plaintiff demonstrated that denial of knee surgery was made in conscious
 4 disregard of an excessive risk to his health. Plaintiff argues that "deliberate indifference can be
 5 shown in the fact that the defendants have failed to carry out medical orders" and that defendants
 6 failed to "cite any penological or medical reason for refusing to allow knee surgery" (#32, p. 4).
 7 For the reasons stated above, these allegations are insufficient to demonstrate that defendants acted
 8 with deliberate indifference.

9
 10 Review of plaintiff's medical records belie plaintiff's claim that defendants were
 11 deliberately indifferent to plaintiff's serious medical needs. Rather, the facts show that defendants
 12 supplied plaintiff with knee braces, a cane, a wheelchair, a walker, and Tylenol (#24, Exs. A, 17,
 13 19-20, 23-27, 29; Ex. B, 1-9 (*sealed*)). NDOC provided plaintiff with numerous knee braces with
 14 hinges to ease his pain and assist him in walking. *Id.* at Ex. B, pp. 2, 3, 6, 8.⁷ NDOC provided
 15 plaintiff with a wheelchair which they allowed him to use for long distance movement within the
 16 prison. *Id.* at 4, 7. Plaintiff also received a cane and walker. *Id.* at 5, 6, 8, 9. NDOC also referred
 17 plaintiff to Dr. Long for a consultation. Plaintiff cannot avoid summary judgment by relying solely
 18 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
 19 1045 (9th Cir. 1989). "Uncorroborated and self-serving testimony" without more, will not create
 20 a genuine issue of material fact precluding summary judgment. *See Villiarimo v. Aloha Island Air,*
 21 *Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Plaintiff presents no other evidence of defendants'
 22 alleged deliberate indifference to his medical needs, nor does he demonstrate any factual issues
 23 concerning whether the defendants were deliberately indifferent.⁸ The court recommends that
 24 defendants' motion for summary judgment (#22) on plaintiff's Eighth Amendment claim be

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 26 ⁷ The court need not consider plaintiff's claims regarding discomfort from his knee brace
 which he raised for the first time in his opposition. *389 Orange Street Partners*, 179 F.3d at 665.

27 ⁸ Plaintiff argues that defendants presented false evidence and withheld information (#32, pp.
 1-2). However, plaintiff attaches the same exhibits produced by defendants to his opposition and fails to
 identify what evidence was allegedly withheld.

1 granted.

2 2. Eleventh Amendment Immunity

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4 The Eleventh Amendment states: "The Judicial power of the United States shall not be
5 construed to extend to any suit . . . against one of the United States by Citizens of another State."
6 U.S. Const. amend XI. The Supreme Court has held that a suit against a state official in his or her
7 official capacity is not suit against that official, but rather a suit against the official's office;
8 therefore, an official acting in his or her official capacity is not a "person" under section 1983. *Will*
9 *v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Since the state and its officials are not
10 considered "persons" within the meaning of section 1983, "they cannot be held liable under the
11 statute for money damages." *Bank of Lake Tahoe v. Bank of America*, 318 F.3d 914, 918 (9th Cir.
12 2003).

13 In his complaint, plaintiff names defendants in their official and individual capacities (#1,
14 pp. 2-3). Plaintiff requests injunctive relief allowing him to see at least one specialist and
15 compensatory, nominal, and punitive damages. *Id.* at 7. As the court recommends summary
16 judgment on the Eighth Amendment claim, plaintiff's request for injunctive relief is moot. Further,
17 it is clear that defendants cannot be sued in their official capacities for money damages. *Bank of*
18 *Lake Tahoe*, 318 F.3d at 918. Therefore, the court recommends summary judgment for defendants
19 in their official capacities for all monetary claims for relief.⁹

20 III. CONCLUSION

21 Based on the foregoing and for good cause appearing, the court concludes that defendants
22 met their burden of proving that there are no genuine issues of material fact for trial. As such, the
23 court recommends that defendants' motion for summary judgment (#22) be **GRANTED** as to
24 plaintiff's Eighth Amendment claim. The court further recommends that plaintiff's motion for a
25 temporary restraining order (#20) be **DENIED** as moot. The parties are advised:
26

27 ⁹ Because plaintiff has not demonstrated that defendants acted with deliberate indifference
to his serious medical needs, the court need not reach issues of qualified immunity.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment on the issue of Eighth Amendment deliberate indifference to a serious medical need against defendants Bannister, Peery, and Keast (#22) be **GRANTED**.

DATED: March 21, 2012.

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